FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	HAV/24UP/LDC/2024/0519
Property	:	Fraser Gardens, Winchester, Hampshire, SO22 5GB
Applicant	:	Fraser Gardens (Winchester) Ltd
Representative	:	Residential Management Group Ltd
Respondent	:	All leaseholders including 10 subtenants of Vivid Housing Ltd (1) Vivid Housing Ltd (2)
Representative	:	Mr Rothwell, counsel, instructed by Trowers & Hamlins LLP
Type of Application	:	S.20ZA of the Landlord and Tenant Act 1985
Tribunal	:	Judge Dovar Mr Cotterell FRICS Ms Wong
Date of Hearing and Venue	:	14th January 2025, Havant
Date of Decision	:	15th January 2025

DECISION

Introduction

1. The Applicant seeks dispensation under Section 20ZA of the Landlord and Tenant Act 1985 from the consultation requirements imposed on the landlord by Section 20 of the 1985 Act. Where a party seeks to recover costs of works through the service charge and those charges will be in excess of £250 per leaseholder, then recovery will be limited to £250, unless either the consultation requirements are met, or the Tribunal gives dispensation under s.27A of the 1985 Act.

2. This Application arises because of a failure to consult a number of sub-tenants in respect of the works. There is also an issue as to whether the Applicant properly consulted the only active Respondent to this application, Vivid, who holds the intermediate lease out of which those sub-leases have been granted.

3. Accordingly, as the Applicant has not properly consulted, if dispensation is not given, then it will be capped at recovering only £250 per leaseholder.

Background

4. The Applicant is the Management Company for the subject Property, which contains 5 residential blocks; Blocks A, B, C, D and E. It identified various remedial works which were necessary to carry out to blocks B to E. As the cost of the works was likely to exceed £250 per leaseholder on 22nd February 2023 it sent out notices of intention under s.20 of the Landlord and Tenant Act 1985, and in accordance with Schedule 4, Part 2 of the Service Charge (Consultation Requirements) (England) Regulations 2003 (2003/1987).

5. It sent those out to the leaseholders at Blocks C to E. Whether it sent them out to Vivid, the leaseholder of all the flats in Block B is in issue. Vivid says that it had not received the Notice of Intention.

6. It is not in dispute that it did not send them out to Vivid's sub-lessees.

7. The Notice of Intention described the proposed works as

> *"External decoration and repairs to include but not limited to flat roof repairs/replacement and balcony Overhauls"*

8. On 21st April 2023 it sent out Notice of Estimates under the said Act and Regulations. That provided two tenders for the works, the lowest, being £343,177.20 including VAT. The description of the works was the same as set out in the Notice of Intention. Further, the addressed leaseholder was notified of the ability to inspect the estimates.

9. Vivid accepts it received this notice.

10. On receipt of the Notice of Estimates, Vivid emailed the Applicant to query whether or not their sub-lessees had also been served; but it took no issue about the non-service of the Notice of Intention on itself. Further, it did not request to see the estimates nor a copy of the Notice of Intention.

11. The Applicant's response was that '*I have had a look for you and can confirm that this letter was only sent to yourselves for you to distribute to the shared owner residents'*. Vivid pointed out that the Applicant needed to send out the notices and chased the lack of response in July 2023. It seems no one told the sub-lessees about the intended works.

12. Vivid then chased an update in September 2023, as it was about to bill the sub-lessees for their share of the service charge. By then, the Applicant had invoiced Vivid for the costs of the works on account, in order to accrue a sinking fund for them. Vivid was about to pass that cost onto its sub-lessees and wanted to clear up the position.

13. A lack of response from the Applicant led Vivid to instruct solicitors. They became involved on behalf of Vivid in about April 2024, and wrote to the Applicant, asserting for the first time that Vivid had not received the Notice of Intention. They requested a copy of that notice and evidence of service on Vivid. They chased a response, but did not get the notice.

14. At some point the Applicant woke up and realised that its failure to serve the sub-lessees jeopardised its ability to recover the full cost of the works as it had failed to adhere to the consultation requirements. Both parties accepted that following *Leaseholders of Foundling Court and O'Donnell Court v Camden LBC* [2016] UKUT 366 (LC), where there were sub-lessees, the obligation to consult those lessees was on the superior landlord (in this case the Applicant) not on the intermediate landlord, i.e. Vivid.

15. The Applicant therefore made this application, but not until 6th September 2024. It has now completed the works.

Service on Vivid

16. Vivid state that they did not receive the notice of intention until it arrived in the bundle provided for this hearing by the Applicant in December 2024. The Applicant contended at the hearing that they had served it on them in 2023.

17. Before the hearing, the Applicant failed to address the issue of service on Vivid at all, let alone adduce any evidence of service. This was a surprising omission given that it had been set out clearly both in the solicitor's letter and in Vivid's statement of case.

18. The explanation given at the hearing was not only very late, but was confused and carried little credibility. The Applicant at first said it was not sure whether it had been posted or emailed, then quickly contended it had been posted, but was unable to say who had posted or what the process would have been.

19. The Tribunal considers that it failed to serve the Notice of Intention on Vivid.

Prejudice / Conditions for Dispensation

20. Therefore in breach of the consultation requirements, the Applicant both failed to serve a Notice of Intention on Vivid and any of the notices on the sub-lessees.

21. On receipt of the bundle in December 2024, Vivid and their solicitors reviewed the documents and came to the conclusion that as there had been competitive tendering, it seemed as if there had been no financial prejudice to them or the sub-lessees in the carrying out of the works. Whilst they felt pressed for time in considering the documents, they did not wish to adjourn the hearing given that they had already spent enough on legal fees to get to this point.

22. At the hearing they contended that whilst the Applicant should have dispensation, that was only on condition that their legal fees were paid in full, being £21,404.39.

23. In that regard reliance was placed on paragraph 64 of *Deajan Investments Ltd v Benson* [2013] UKSC 14, where Neuberger PSC said

> "*Like a party seeking a dispensation under section 20(1)(b), a party seeking relief from forfeiture is claiming what can be characterised as an indulgence from a tribunal at the expense of another party. Accordingly, in so far as the other party reasonably incurs costs in considering the claim, and arguing whether it should be granted, and, if so, on what terms, it seems appropriate that the first party should pay those costs as a term of being accorded the indulgence.*"

24. It was said this supported their costs being paid and paid on the indemnity basis, as that is the usual order when a leaseholder seeks relief from forfeiture.

25. In addition to Vivid's objection, Mr Plunton of flat 15, Block B, objected in writing, although he did not attend the Tribunal hearing or taken any further part in these proceedings. He raises issue of cost, financial distress, and queries the need for the works, let alone any urgency in

carrying them out. These points were not taken further and there was no evidence to support his query over the need for the works.

26. In the end, no party has raised any evidence of financial prejudice in the costs of the works actually undertaken. Further no leaseholder of the other blocks made any observations (or nominations) in respect of either the Notice of Intention or the Statement of Estimates.

Consideration

27. The Applicant has made life more difficult for themselves and Vivid by ignoring correspondence and issuing these proceedings late, and then failing to comply with various directions, with the result that Vivid was not provided with the material information until shortly before the hearing.

28. Ultimately, no party has contended that there was actually any prejudice caused by the failure to consult. Vivid also raised the issue of non-service a year after they had notice that one had been served on other leaseholders. They also did not make any observations on the Notice of Estimates, nor seek to examine the estimates. Even if they had been provided with the Notice of Intention, that would have said nothing more than the description of work proposed given on the Notice of Estimates.

29. The Tribunal does accept that given the failure to serve the notices, Vivid was entitled to test the application and whether or not there had been prejudice.

30. However, the Tribunal does not consider that costs of £21,404.39 were reasonable to incur in a case where the deficiency vis a vis their consultation was with the Notice of Intention, and they had received the Notice of Estimates. Further, even if they were to be assessed on the indemnity basis, that does not justify the amount claimed. It only means that any doubt as to whether they were reasonable is resolved in the Respondent's favour.

31. The Tribunal considers that a sum of £7,200 inclusive of VAT is at the top end of what would have been reasonable to incur, which takes into account any 'doubt' as to whether costs incurred were reasonable.

32. That sum comprises broadly:

    a. Two hours for taking instructions that no Notice of Intention had been served on either Vivid or their sub-lessees;

    b. Another hour spent writing letters to the Respondent;

    c. A couple of hours considering the application and directions;

    d. The statement of case should have taken no more than three hours given that Vivid did not know the detail of the works and the document runs to 5 pages;

    e. A few more hours for general work on the matter as it progressed including reading the bundle when it arrived;

    f. In total, say around 12 hours at £319 per hour (being the predominant rate claimed by Vivid), so £4,000;

    g. A fee of £2,000, for counsel to attend a 2 hour hearing, with around 6 hours preparation, where it was being contended that Vivid should have their costs as a condition of dispensation, but no greater substantive issue was engaged.

Conclusion

33. Accordingly, the Tribunal grants dispensation in respect of the major works on condition that the Applicant pays the Respondent the sum of £7,200 inclusive of VAT.

JUDGE DOVAR